Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1282

BILL WILLIAMS, ET AL.,
Petitioner,

VERSUS

JIMMY LOUIS PHILLIPS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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February, 1979

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Attorney General of the State of Oklahoma, on behalf of Bill Williams, et al., the Petitioners herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oklahoma entered in the above entitled case on April 25, 1978.

OPINIONS BELOW

The Opinion of the Supreme Court of Oklahoma is reported at 49 O.B.J. 723, ___ P.2d ___ (Okl. 1978), and is printed in Appendix 'A' hereto, *infra,* page A-1.

JURISDICTION

The judgment of the Supreme Court of Oklahoma was entered on April 25, 1978. A timely Petition for Rehearing was denied November 15, 1978. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment applies to the parole release procedures employed in the State of Oklahoma.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, 14th Amendment:

> Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Oklahoma Constitution, Article 6, §10:

> §10. *"Reprieves, commutations, paroles and pardons.* — There is hereby created a Pardon and Parole Board to be composed of five members; three to be appointed by the Governor; one by the Chief Justice of the Supreme Court; one by the Presiding Judge of the Criminal Court of Appeals or its successors. The appointed members shall hold their office co-terminous with that of the Governor and shall be removable for cause only in the manner provided by law for elective officers not liable for impeachment. It shall be the duty of the Board to make an impartial investigation and study of applications for commutations, pardons or paroles, and by a majority vote make its recommendations to the Governor of all deemed worthy of clemency.
>
> "The Governor shall have the power to grant, after conviction and after favorable recommendation by a majority vote of the said Board, commutations, pardons and paroles for all offenses, except cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to such regulations as may be prescribed by law. The Governor shall have power to grant after conviction, reprieves, or leaves of absence not to exceed sixty days, without the action of said Board.
>
> "He shall communicate to the Legislature, at each regular session, each case of reprieve, commutation, parole or pardon, granted, stating the name of the convict, the crime of which he was convicted, the date and place of conviction, and the date of commutation, pardon, parole and reprieve. As amended State Question No. 309, Referendum Petition No. 86. Adopted special election July 11, 1944."

57 O.S. (1971) §332:

> *"Pardons and paroles — Power of Governor.* — The Governor shall have power to grant, after conviction, reprieves, commutations, paroles and pardons for all offenses, except cases of impeachment, upon such conditions and such restrictions and limitations as he may deem proper, subject, however, to the regulations hereinbefore prescribed. Laws 1915, c. 57, §6."

57 O.S. (1971) §332.2:

> *"Meetings of pardon and parole board — Examination of applications — Recommendations* — The Pardon and Parole Board, which shall meet only on the call of the Chairman, is authorized, if and when an application made to the Governor for a reprieve, commutation, parole, pardon, or other act of clemency is certified thereto by the Governor, to examine into the merits of said application and make recommendations to the Governor in relation thereto, said recommendation being advisory to the Governor and not binding thereon. Laws 1943, p. 250, §2."

57 O.S. (1971) §332.7:

> *"Inquiry and investigation as basis for recommendation* — Upon completion of one-third (1/3) of the sentence of any person confined in a penal institution in the State of Oklahoma such person shall be eligible for consideration for a parole, and it shall be the duty of the Pardon and Parole Officer, with or without application being made, to cause an examination to be made at the penal institution where the person is confined, and to make inquiry into the conduct and the record of the said person during his confinement in said penal institution, and thereafter said Pardon and Parole Officer shall report to the Pardon and Parole Board his findings, which shall be considered as a basis for consideration of said person for recommendation to the Governor for parole. Laws 1947, p. 343, §1.

57 O.S. (1971) §354:

> *"Continuing study of prisoner by pardon and parole board — Hearings — Recommendations.* — Upon the commitment to imprisonment of any prisoner under the provisions of Section 1 hereof, the Pardon and Parole Board shall cause a continuing study to be made of the prisoner. When the prisoner has served the minimum sentence imposed, or as soon thereafter as he or she can be heard, the Pardon and Parole Board shall hear the prisoner's application for parole, and shall make such recommendation to the Governor as, in its discretion, the public interest requires. Nothing herein contained shall be construed to prevent a hearing by the Pardon and Parole Board before the minimum term has been served. Laws 1963, c. 78 §2."

STATEMENT OF CASE

Jimmy Louis Phillips, the petitioner below, is presently incarcerated in the Oklahoma State Penitentiary under the judgment and sentence of the District Court of Oklahoma County, State of Oklahoma, finding him guilty of rape and sentencing him to 1,000 years in the custody of the Department of Corrections. Phillips was delivered to the Oklahoma State Penitentiary on October 13, 1970.

On October 16, 1975, Phillips first appeared before the Correctional Review Committee at the Oklahoma State Penitentiary. The Correctional Review Committee acts as a screening committee for the Pardon and Parole Board and is composed of one Pardon and Parole Board employee and four institutional employees. The Correctional Review Committee reviews the records of each inmate and compiles a monthly "docket" of prisoners for use by the Pardon and Parole Board. In selecting prisoners to place on a docket, the Correctional Review Committee adheres to guidelines established by the Pardon and Parole Board as well as 57 O.S. (1971) §332.7 and §354. Any member of the Pardon and Parole Board may place a prisoner on

a docket, in addition to those prisoners recommended by the Correctional Review Committee. However, once placed on the docket by the Correctional Review Committee a prisoner can only be removed by a majority vote of the Pardon and Parole Board. After his initial appearance before the Correctional Review Committee it was recommended that Phillips not be placed on the docket at the present time. On November 19, 1975, the Pardon and Parole Board reviewed and concurred in the recommendation of the Correctional Review Committee.

Phillips next appeared before the Correctional Review Committee on October 21, 1976. This time it was recommended that he be placed on the March, 1977 docket. On November 24, 1976, the Pardon and Parole Board reviewed this action and voted that Phillips not be considered by the Board at its March, 1977 meeting.

Subsequent to the decision of the Pardon and Parole Board, Phillips filed an original action in the Supreme Court of the State of Oklahoma. On April 25, 1978, that court assumed jurisdiction and issued the Writ of Mandamus which is the subject of this Petition for Writ of Certiorari.

REASON FOR GRANTING THIS WRIT

The Petitioners contend that the opinion of the Supreme Court of the State of Oklahoma:

1. Decides a substantial federal question not yet decided by this Court. The Opinion which is the subject of this Petition holds that the Due Process Clause of the 14th Amendment applies to the State parole release process and requires that a prisoner be given a written reason why he is denied parole. This issue has not yet been decided by this Court.

CONCLUSION

For the reasons stated above, this Petition for Writ of Certiorari should be granted. Further, the Petitioners submit that the issues raised herein are similar if not identical to the issues raised in *John B. Greenholtz, etc., et al.* v. *Inmates of the Nebraska Penal and Correctional Complex, et al.*, No. 78-201, *cert. granted* October 2, 1978, ... U.S. ....., 99 S.Ct. 76, 58 L.Ed.2d 107, and that it would be appropriate to join this appeal with the appeal in *Greenholtz* v. *Inmates*, supra.

Respectfully submitted,

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Attorney for Petitioner

of Counsel:

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February, 1979

AFFIDAVIT OF SERVICE

STATE OF OKLAHOMA
COUNTY OF OKLAHOMA

I, JOHN F. FISCHER, II, depose and say that I am an attorney in the office of Jan Eric Cartwright, attorney of record for Bill Williams, et al., Petitioners herein, and that on February ....., 1979, pursuant to Rule 33 of the Rules of the Supreme Court, I served three (3) copies of the foregoing Petition for Writ of Certiorari, by mailing same in a duly addressed envelope, with First Class postage prepaid, to each of the following named counsel of record:

Merton M. Bulla
Bulla, Horning & Johnson
1503 First National Center
Oklahoma City, Oklahoma

All parties required to be served have been served.

.....
JOHN F. FISCHER, II

Subscribed and sworn to before me on this ..... day of February, 1979.

.....
Notary Public

.....
My Commission expires:

APPENDIX 'A'

FOR OFFICIAL PUBLICATION

FILED
SUPREME COURT
STATE OF OKLAHOMA
APR 25 1978
Ross N. Lillard, Jr.
CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

JIMMY LOUIS PHILLIPS, Petitioner,	)	
v.	)	
	)	No. 51,721
BILL WILLIAMS, et al, Respondents.	)	

An application to assume original jurisdiction and petition for writ of mandamus to require Oklahoma Pardon and Parole Board to give reasons for its removal of petitioner's name from consideration for parole after Corrections' Review Committee placed his name on the parole docket.

ORIGINAL JURISDICTION ASSUMED

WRIT OF MANDAMUS GRANTED

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Attorney General of Oklahoma
Harold B. McMillan, Jr.,
Assistant Attorney General
Oklahoma City, Oklahoma 73105 — For Respondents.

DOOLIN, J.:

Petitioner Jimmy Louis Phillips, incarcerated in the Oklahoma State Penitentiary, is seeking relief by this special application asking this court to require the Pardon and Parole Board to furnish a written statement of the reasons he has been denied a recommendation for parole.

Petitioner originally sought relief from the Court of Criminal Appeals in November of 1977. That court refused to reach the merits of his petition denying it had jurisdiction to hear the application by virtue of *Jerry* v. *Pardon and Parole Board* 546 P.2d 650 (Okla. 1976). In *Jerry* the same request for a written statement from the Pardon and Parole Board was presented to the Oklahoma Court of Criminal Appeals which held it had no power to issue a writ of mandamus to any administrative body.[1]

Petitioner was placed on the March 1977 parole docket by the Correctional Review Committee (CRC) in October of 1976. He was subsequently removed from consideration by the Pardon and Parole Board (Board). In the present application petitioner seeks to require Board to state its reasons for his removal from the parole docket and thus his denial of parole.

In Oklahoma the power to grant parole lies solely with the governor. The governor considers for parole only those inmates recommended to him by the Board. Accord-

[1] Petitioner also joined with another inmate in filing an action in the United States District Court for the Eastern District of Oklahoma as a civil rights' action under 42 USC § 1983. That action was against the Correction Review Committee (CRC), not the Pardon and Parole Board. The federal court, while dismissing the action by an unpublished order, stated, "It is now settled that a prisoner is entitled to a brief statement of the reasons for parole board's denial of parole." (Citations omitted). Court based its dismissal on fact that action was brought against CRC rather than Parole Board. The tenth circuit affirmed by order stating it agreed with statements expressed by federal district court; see Livebarger and Phillips v. Williams, #77-8113, March 17, 1978.

ing to the Board's rules, an inmate may be placed on the docket for consideration of parole in three ways: (1) under Forgotten Man Act 57 O.S. 1971 § 332.7 which requires that an inmate must be considered for parole upon completion of 1/3 of his maximum sentence or 15 years; (2) by a member of the Board; or (3) through a recommendation by the CRC.

The CRC is a committee established under the Division of Community Services[2] by the authority of 57 O.S. 1977 Supp. § 514 to provide effective and efficient services to prison inmates and to the Board respecting parole.[3] In addition to reviewing and making recommendations regarding inmates routinely at the completion of 1/3 of their sentences, the CRC also recommends inmates be placed on the parole docket based on other criteria established as bases for a recommendation of parole.

In petitioner's case the CRC initially notified him it had recommended to Board that he be considered for parole and placed on the docket. He was subsequently notified he

[2] 57 O.S. 1977 Supp. § 514 provides:

"The Division of Community Services shall:

a. . . .

b. Make investigations and inquiries as to prisoners at the institutions who are to be, or who might be, considered for parole or other clemency;

. . ."

[3] The reference to CRC in rules of Board is found at 57 O.S. 1977 Supp. Ch. 7, App. under "Hearings."

"No formal application for a parole hearing is required. Any type of written request, letter, memorandum or otherwise; made to the Office of Division of Probation and Parole, or to any member of the Pardon and Parole Board, or to any duly authorized official to transmit such message to the proper officials will suffice. A subject may be placed on the "Docket" for consideration of parole, commutation, leave, or clemency by (1) Recommendation of the Corrections Review Committee, subject to final approval of the Board, or (2) Any member of the Board. . . ."

had been removed from the docket by the Board. Petitioner claims this is tantamount to a denial of parole by the Board for which it should be required to give reasons.

The Board is expressly excluded from the Oklahoma Administrative Procedures Act, 75 O.S. 1971 § 301 et seq. and thus its requirements of findings of fact and conclusions of law. Any right of petitioner to the requested statements must come through constitutional due process.

In *Jerry* v. *Pardon & Parole Board, supra,* while not reaching the merits of the question, the Court of Criminal Appeals recognized the clear trend of decisions requires the Board to give its reasons for denial of parole to an inmate, citing:

> Childs v. United States Board of Parole, 167 U.S. App. D.C. 268, 511 F.2d 1270 (1974); Cook v. Whiteside, 505 F.2d 32 (5th Cir. 1974); Mower v. Britton, 504 F.2d 396 (10th Cir. 1974); United States ex rel. Johnson v. Chairman, N.Y. St. Bd. of P., 500 F.2d 925 (2nd Cir. 1974) [vacated as moot Regan v. Johnson 419 U.S. 1015, 955 Ct. 488, 42 L.Ed.2d 189 (1974)]; King v. United States, 492 F.2d 1337 (7th Cir. 1974); Fischer v. Cahill, 474 F.2d 991 (3rd Cir. 1973); Solari v. Vincent, 46 A.D.2d 453, 363 N.Y.S.2d 332 (1975); In re Sturm, 11 Cal.3d 258, 113 Cal. Rptr. 361, 521 P.2d 97 (1974); State v. Goulette, 65 Wis.2d 207, 222 N.W. 2d 622 (1974); Moore v. Florida Parole and Probation Commission, 289 So.2d 719 (Fla. 1974); Monks v. New Jersey State Parole Board, 58 N.J. 238, 277 A.2d 193 (1971).

The majority of these cases hold although the full range of constitutional rights do not apply to parole decisions, minimal due process in [*sic*] required. For example in *Childs* v. *United States Board of Parole, supra,* the circuit court held federal prisoners were entitled to a written statement of reasons for a denial of parole in order to assure the validity of the parole procedure. In *Fischer* v. *Cahill, supra,* a New Jersey applicant was held entitled to a statement of reasons for denial of parole under USC 1983 § 42 of the Civil Rights Act. The second circuit, in *Johnson* v. *Chairman, N.Y. St. Board of Parole, supra,* based on due process held inmates must be given a statement by the Board, including the grounds for its decision and the essential facts upon which its inferences were based.

State courts have also joined in making such a requirement. *Monks* v. *New Jersey State Parole Board, supra,* found a rule by the New Jersey Board that it would not reveal the basis for denial of parole was invalid. The court stated that rule must be replaced by a rule "designed generally toward affording statements of reasons of parole denials . . ." In accord are *In re Sturm, supra,* and *Solari* v. *Vincent, supra.* Wisconsin requires a record be kept of parole hearings and judicial review provided by a writ of certiorari to the committing court, *State* v. *Goulette, supra.* See also *Barr* v. *United States,* 415 F. Supp. 990 (W.D. Okla. 1976).

A prisoner is not wholly stripped of constitutional protections when he is imprisoned for a crime. No iron curtain is drawn between the Constitution and the inmates of prisons in this country.[4] Consideration for parole is an aspect of liberty to which at least minimal due process must extend.[5] By requiring the Board to confront an inmate with its decision and the reasons behind it, a sense of fairness and openness is created essential to promoting

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[4] Wolff v. McDonnell 418 U.S. 539, 555, 94 S.Ct. 2963, 2974, 41 L.Ed. 2d 935 (1974).

[5] Bradford v. Weinstein 519 F.2d 728 (4th Cir. 1974) vacated as moot 423 U.S. 147, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975).

a perception of parole as a system which does not make sub rosa judgments based on vague and punitive reasoning. It has been said, government action must not only be fair, it must *appear* to be fair.[6] We agree that, "one of the best procedural protections against arbitrary exercise of discretionary power lies in the requirement of findings and reasons that appear to reviewing judges to be rational."[7]

We must emphasize the question propounded is not the right to parole. No such "right" exists. However, an inmate certainly has the "right" to fair treatment in the granting or withholding of parole. Thus the question is whether there is a *right to minimal procedural due process* in consideration of parole. We believe there is. This must necessarily include a right to know why an inmate is refused parole by the Board, most particularly in a case such as this where petitioner was notified that the CRC recommended his consideration and then for some reason unknown to him and unascertainable by inquiry, he was removed from consideration.

Certainly the overall effect of apprising an inmate of the reasons for denial would be beneficial to him in that he could then make an attempt to conform or satisfy the absent criteria prior to his again making application for parole.

The Attorney General apparently does not argue with the authorities holding an inmate is entitled to reason for denial of parole. He attempts to distinguish petitioner's situation where he has been *removed* from the parole docket or *refused placement* on the docket after a recommendation by CRC. He submits by removing petitioner's name from the docket, the Board has *not considered* petitioner for parole, therefore could not have *denied* him a parole for which it should be prepared to give written reasons. He argues no prisoner who has served less than 1/3 of his sentence or 15 years must be considered for parole.

[6] O'Leary and Nuffield "Parole Decision — Making Characteristics: Report of a National Survey", 8 Crim. L. Bull. 651, 665 (1972).

[7] Monks v. State Board of Parole, 227 A.2d 193, 196 (New Jersey 1971).

We do not believe these different standards should apply. Otherwise the Board could conceivably circumvent the requirement of a statement of reasons for denial of parole by simply removing an inmate's name from the docket. Board provides for three enumerated methods of obtaining consideration for parole. Petitioner received the required recommendation by the CRC to place him on the docket. Once an inmate is placed on the docket, he has an expectation of parole. The manner in which such inmate is denied parole, which here involved a removal from the docket after a favorable recommendation by the CRC, should not control. We therefore hold petitioner is entitled to a statement of the reasons for his removal from the March 1977 parole docket.

This is not to say that the inmate is entitled to a formal finding and detailed reasons for denial of a recommendation of parole. A concise and honest reason, couched in brief but informative language will suffice.

WRIT OF MANDAMUS ISSUED.

DAVISON, WILLIAMS, IRWIN, BERRY and SIMMS, JJ., concur. LAVENDER, V.C.J. and BARNES, J., dissent.